



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary  
Office of the General Counsel  
Public Health Division

March 21, 1996

Mr. Mel Noel  
Office of the General Counsel  
Department of Veterans Affairs  
025 VANAC  
P. O. Box 76  
Hines, IL 60141

Re: Direct access to the VA prime vendor contract by Indian tribes and tribal organizations contracting with the IHS under the Indian Self-Determination Act

Dear Mr. Noel:

This letter is a follow up to our discussion of the question whether tribes and tribal organizations which have contracted or entered into self-governance compacts with the Indian Health Service (IHS) under the Indian Self-Determination Act, 25 U.S.C. 450 *et seq.*, may procure covered drugs directly through the VA prime vendor contract at prices established by section 603 of the Veterans Health Care Act of 1992, Pub. L. 102-585, 38 U.S.C. 8126. As I told you over the telephone, I believe that this is a legal determination for the Office of the General Counsel at the VA to make because it hinges on interpretation of section 603 of the VHCA.

This letter will supersede Mr. Ishem's letter of January 30, 1996, and clarify our legal interpretation of section 105(k) of the ISDA. The role of this office is to provide legal advice and legal interpretations. We do not determine agency policy and this letter is not intended and does not constitute a statement of IHS policy regarding tribal access to the VA prime vendor system.

It is my understanding that section 603 of the VHCA establishes a mechanism to control prices paid by three named federal agencies for covered drugs required to be listed on the Federal Supply Schedule (FSS). 38 U.S.C. 1826(a)(2) and (b). Section 1826(a)(2) establishes a discount for "each covered drug. . . procured by a Federal agency described in subsection (b)." Subsection (b) names the VA, DOD and "the Public Health Service including the Indian Health Service." The section 603 discount enables these three Federal agencies to procure covered drugs which are required to be listed on the FSS at substantial price savings.

The VA has established a prime vendor system which has realized savings on distribution

603  
1. VA  
2. DOD  
3. PHS

FSS

603

March 21, 1996

Page - 2

Tribes → 3 pgs

costs. The IHS has used the VA prime vendor system to take advantage of these cost savings for IHS directly operated and tribally operated health care facilities. Tribes and tribal organizations that contract or compact to carry out IHS health delivery programs and services under the ISDA order drugs from IHS supply centers that procure drugs on their behalf through the VA prime vendor system at section 603 discount prices. This constitutes an IHS procurement by IHS contracting officers. Although not all IHS supply centers procure drugs through the VA prime vendor program for Tribes or tribal organizations that contract or compact under the ISDA, tribes and tribal organizations may obtain section 603 discount pricing by going through the IHS procurement process.

It is important to note that there is no legal requirement that tribes and tribal organizations contracting or compacting under the ISDA order drugs or any other supplies through the IHS supply centers or IHS procurement systems. Tribes and tribal organizations may choose to procure goods and services on their own through their own procurement systems and not go through the IHS. In fact, they generally use their own procurement systems to buy a variety of needed goods and services to carry out their ISDA contracts. When they use their own procurement systems, however, they buy goods or services on their own account, not as agents of the IHS. The IHS is not legally responsible for tribal procurements and vendors have no legal recourse against the IHS in such a situation.

When using their own procurement systems, tribes and tribal organizations can take advantage of federal supply sources available to federal agencies under section 201(a) of the Federal Property and Administrative Services Act, 40 U.S.C. 481(a). This is authorized by section 105(k) of the ISDA, 25 U.S.C. 450j(k), which states:

For purposes of section 201(a) of the Federal Property and Administrative Services Act of 1949 (40 U. S. C. 481(a)) (relating to Federal sources of supply, including lodging providers, airlines and other transportation providers), a tribal organization carrying out a contract, grant, or cooperative agreement under this Act shall be deemed an executive agency when carrying out such contract, grant, or agreement and the employees of the tribal organization shall be eligible to have access to such sources of supply on the same basis as employees of an executive agency have such access.

Section 201(a) of the FPASA authorizes the GSA to assist other federal agencies in the procurement of personal property and nonpersonal services including representing such agencies in negotiations with carriers and other public utilities with respect to transportation and other public utility services. The legislative history to subsection 105(k) in Senate Report No. 103-374, September 26, 1994, at page 7, explains Congressional intent as follows:

March 21, 1996

Page - 3

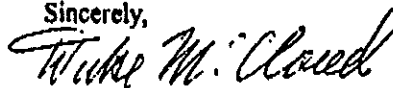
New subsection 105(k) cures a technical problem which has deprived tribal organizations of the ability to take advantage of the same federal airfares and lodging rates which apply when Indian programs are administered by federal employees. This unintended consequence has substantially increased the cost of administering programs subject to the Act, and effectively treats self-determination contracts as if they were ordinary government procurement contracts, ignoring the government-to-government relationship upon which the Act is based. The amendment corrects the problem and allows tribal organizations and their employees the same access as federal agencies to rates for air travel and similar sources of supply which are regularly negotiated by the General Services Administration.

Our view of section 105(k), and how we have advised IHS, is that tribes and tribal organizations utilizing their own procurement systems in carrying out their ISDA contracts or compacts are deemed individual executive agencies in their own right, separate from the IHS, for purposes of section 201(a) of the FPASA. These tribes and tribal organizations may take advantage of federal supply sources available to federal agencies under section 201(a). This includes purchasing drugs and other goods off the Federal Supply Schedule.

Section 105(k) states that a tribal organization carrying out an ISDA contract "shall be deemed an executive agency when carrying out such contract . . ." This puts tribes and tribal organizations utilizing their own procurement systems in carrying out their ISDA contracts on a par with federal agencies for purposes of section 201(a). We do not view section 105(k) as deeming tribes and tribal organizations part of the IHS for purposes of section 201(a) of the FPASA. Contrast section 102(d) of the ISDA, 25 U.S.C. 450f(d), which specifically deems tribes and tribal organizations and their employees part of the PHS for purposes of Federal Tort Claims coverage.

I hope that this information is helpful. As I noted earlier, whether tribes may procure covered drugs directly through the VA prime vendor system at discount prices established under section 603 of the VHCA is a determination which must be made by your office. If you have questions or wish to discuss this matter further, please do not hesitate to call me.

Sincerely,



Duke McCloud  
Chief, IHS Branch  
Public Health Division